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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 774

O. C. ALTMAIER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 52–60) is not reported. The opinion of the Circuit Court of Appeals (R. 90–95) is reported in 116 F. (2d) 162.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 13, 1940 (R. 89). The petition for writ of certiorari was filed February 19, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the income for the years 1932 and 1933 from three trusts is taxable to the grantor under Section 167 of the Revenue Act of 1932.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved are set forth in the Appendix, *infra*, pp. 9–14.

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 52–58) and stipulated by the parties (R. 67–82), may be summarized as follows:

On February 18, 1932, the taxpayer created three separate trusts which are identical except that the residuary beneficiary in each one is a different minor child of the taxpayer (R. 52). The corpus of each trust consists of 1,200 shares of the common stock of Columbus Coated Fabrics Corporation (R. 67–70). The wife of the taxpayer was named the sole trustee when the trusts were created, but on September 28, 1932, The City National Bank & Trust Company of Columbus was appointed co-trustee (R. 52).

The trust agreements provide that the income of the trust property is to be accumulated and added to principal during the life of the taxpayer or until the death of his wife, should she prede-

cease him (R. 72). Beginning at the death of the taxpayer, should he predecease his wife, the net income derived from the investment and reinvestment of the trust estates is to be paid to the wife for the remainder of her life, and the principal is also to be paid to her if she wishes to withdraw it. Beginning at the death of the wife, should she predecease the taxpayer, the net income derived from the investment and reinvestment of the trust estates is to be paid to the taxpayer for the remainder of his life (R. 72–73.) Upon the death of the survivor of the taxpayer and his wife, parts of the principal of each trust are to be distributed to the child named as residuary beneficiary of that trust at stated ages, or to his next of kin, and the income from the undistributed parts is to be paid to him or his next of kin (R. 73–76).

The taxpayer, by specific provisions of the trust agreements, reserved the following powers: (1) jointly with his wife, to require the trustee to mortgage, pledge, hypothecate, transfer and/or assign the trust property for the purpose of providing collateral security for indebtedness of himself or of his wife, or of persons, corporations, etc., designated by them, with no obligation of reimbursement except that excess collateral, or its value, is to be returned to the trust estates (R. 77–78); (2) to direct the purchase and sale of investments for the trust estates (R. 78); (3) jointly with his wife during their joint lives and after her

death by himself alone, to alter, amend, revoke, or terminate the trust agreements or withdraw property from the trust estates without the necessity of reimbursement (R. 78–79); (4) to exercise the voting power of stock in the trust estates (R. 79–80); and (5) to discharge the trustee upon thirty days' written notice (R. 81).

On the date the trusts were established, the taxpayer was 44 years of age, his wife was 40, and his three children were 14, 12, and 4, respectively. They were all living on December 31, 1933. (R. 57–58.)

The taxpayer did not include the trust income in his income tax returns for 1932 or 1933 (R. 70). The Commissioner determined that the trust income was taxable to the taxpayer under Section 167 of the Revenue Act of 1932 and assessed deficiencies accordingly (R. 58). The Board of Tax Appeals sustained his determination (R. 60), and the Circuit Court of Appeals affirmed (R. 89).

ARGUMENT

1. The income under the trusts is being accumulated and added to the principal. It is being accumulated for future distribution to the taxpayer because upon the death of his wife he may, in his sole discretion, alter, amend, revoke, or terminate the trusts and withdraw any property therefrom (R. 78–79). In this situation, the decision of the court below that Section 167 (a) (1) applies is

clearly correct. The decision is supported by *Kaplan* v. *Commissioner,* 66 F. (2d) 401 (C. C. A. 1st). See also *Frost* v. *Commissioner,* 38 B. T. A. 1402. In all cases since *Helvering* v. *Hallock,* 309 U. S. 106, the statute has been applied where the contingency is the survival of one other person by the grantor. See *Graff* v. *Commissioner,* 40 B. T. A. 920, affirmed, January 14, 1941, by the Circuit Court of Appeals for the Seventh Circuit, not yet officially reported but found in 1941 C. C. H., Vol. 4, ¶9188; *Armour* v. *Commissioner,* 41 B. T. A. 777, 794–796; *Phipps* v. *Commissioner,* 42 B. T. A. 329. The *Kaplan* decision was followed in *First Nat. Bank* v. *Commissioner,* 110 F. (2d) 448 (C. C. A. 7th), where the grantor could not get the accumulated income for three years.

Herzog v. *Commissioner,* 116 F. (2d) 591 (C. C. A. 2d), does not suggest that *Helvering* v. *Hallock, supra,* has been pressed too far here. That was a gift tax case where the discretionary power was vested solely in the trustee and where the grantor had no right of any kind ever to get the income.

There is no conflict with *Commissioner* v. *Waterbury,* 97 F. (2d) 383 (C. C. A. 2d). That case arose under Section 167 of the Revenue Act of 1928, c. 852, 45 Stat. 791, which, unlike the Revenue Act of 1932, involved here, dealt exclusively with cases where the accumulation of income was in the discretion of the grantor. The accumulation in the *Waterbury* case was due solely to the

fact that capital gains were realized in the taxable year which were not currently distributable. The accumulation here is required by the trust provisions and the applicable statute reaches cases where there is accumulation in fact, as well as where the accumulation is within the grantor's discretion. This Court denied certiorari in the *Waterbury* case, 305 U. S. 638, despite a claimed conflict with the *Kaplan* case.

2. The court below also rested its decision in part upon the provisions of Section 167 (a) (2), which it held to be applicable because the taxpayer could secure the accumulated income even during the lifetime of his wife by a joint instrument in writing. The taxpayer contends that this is erroneous for the reason that if his wife survives him she will have power to withdraw the principal and therefore cannot be considered as a person without "a substantial adverse interest" in the disposition of the accumulated income. The Circuit Court of Appeals held otherwise, relying upon "the normal consequences of family solidarity" which influenced the decisions of this Court in *Helvering* v. *Clifford,* 309 U. S. 331, and *Helvering* v. *Horst,* decided November 25, 1940, No. 27, present Term. A similar dependence upon the family relationship was employed in *Cox* v. *Commissioner,* 110 F. (2d) 934 (C. C. A. 10th), certiorari denied, October 14, 1940. The comment in the opinion in *Commissioner* v. *Branch,* 114 F.

(2d) 985 (C. C. A. 1st), to which the taxpayer refers (Br. 20), merely expresses a doubt that the *Clifford* case authorizes taxing the grantor of a trust under Section 22 (a) for the reason that the income beneficiary is his wife. It is not remotely in point here.

Moreover, the current accumulation of the income, coupled with the right of the taxpayer to revoke the trust after the death of his wife, is an independent reason supporting the application of Section 167 (a) (2). The statute does not specify any particular time when the grantor must possess the requisite discretion.

3. There is no basis for taxpayer's contention that the court below has decided this case upon an issue which had been previously abandoned (Pet. 6). Petitioner relies upon a statement in the deficiency notice (R. 13) to the effect that the wife holds a substantial beneficial interest in each of the trusts. This was said with reference to Section 166, and it was conceded that the trusts were irrevocable under that section. However, in the same letter, the Commissioner relied upon Section 167 (a) (1) and (2). The case was decided by the Board of Tax Appeals under Section 167, and the Circuit Court of Appeals likewise placed its decision upon the application of Section 167 (a) (1) and (2). In *Helvering* v. *Wood*, 309 U. S. 344, upon which taxpayer relies, the Commissioner had

expressly waived the point in the Circuit Court of Appeals.

CONCLUSION

The decision of the court below is correct. There is no conflict with the decision of any other circuit court of appeals or with any decision of this Court. No question of general importance is presented. The petition should be denied.

Respectfully submitted.

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